



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 14, 2003

Ms. Marianna M. McGowan
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2003-3258

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181477.

The Plano Independent School District (the "district"), which you represent, received a series of requests from the same person for information pertaining to certain district employees and other matters. You inform us that the district has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.114, 552.117, and 552.137 of the Government Code. You also believe that these requests for information implicate a third party's privacy interests. You notified the third party of these requests for information and of her right to submit arguments to this office as to why information relating to her should not be released.¹ We received correspondence from an attorney for the party that you notified. We also received correspondence from the requestor.² We have considered all of the submitted arguments and have reviewed the submitted information.³

¹See Gov't Code § 552.305; Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We begin by noting that when a governmental body asks this office to decide whether requested information is excepted from public disclosure, it must comply with the deadlines prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301. If the governmental body fails to do so, the requested information is presumed to be public and must be released unless there is a compelling reason to withhold any of the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The governmental body can overcome the presumption that information is public under section 552.302 by demonstrating that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). This request for a decision presents issues with regard to the district's compliance with section 552.301. However, all of the exceptions to disclosure that the district claims present compelling reasons for non-disclosure under section 552.302. Therefore, we need not determine whether the district has complied with section 552.301 in requesting this decision.

The district claims that some of the submitted information is confidential under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995).

In this instance, you have submitted information that you contend is confidential under FERPA. Accordingly, we will address your claim. You state that the documents submitted as Exhibit 59 contain e-mail addresses and other information that reveals the identities of students. We agree that FERPA is applicable to any submitted information that reveals the identity of a current or former student of the district or a parent of a current or former student, including the e-mail address of such a student or parent. The district must not release those types of information unless it is authorized under FERPA to do so. We have marked a sample of the type of information that is confidential under FERPA if the information relates to a current or former student or a parent of a current or former student.

You inform us that Exhibit 59 also contains the e-mail addresses of members of the public. Section 552.137 of the Government Code provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 protects the personal e-mail addresses of members of the public. Section 552.137 is not applicable to an institutional e-mail address or Internet website or to e-mail addresses that a governmental body provides to its officials or employees. You state that Exhibit 59 also contains the e-mail addresses of members of the public, none of whom has affirmatively consented to the disclosure of his or her e-mail address. Therefore, to the extent that FERPA is not applicable to the personal e-mail addresses contained in Exhibit 59, we agree that those e-mail addresses are excepted from disclosure under section 552.137. We have marked a sample of the types of e-mail addresses that the district must withhold under section 552.137.

Next, we address your claims with regard to the information submitted as Exhibit 62. Section 552.101 of the Government Code excepts from disclosure "information considered

to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that another statute makes confidential. The district raises section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word “teacher,” for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* Open Records Decision No. 643 at 4. We also concluded that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You state that the documents submitted as Exhibit 62 contain information that is confidential under section 21.355 of the Education Code. We assume that the information in question relates to a teacher who holds a certificate under subchapter B of chapter 21 of the Education Code or a teaching permit under section 21.055. Given that assumption, we have marked the submitted information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code as information made confidential by law.

Exhibit 62 also contains information that is confidential under the Americans with Disabilities Act of 1990 (the “ADA”), 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a “fitness for duty examination,” conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the “EEOC”) has determined that medical information for the purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the information that the district must withhold under section 552.101 of the Government Code in conjunction with the ADA.

You also raise section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." This exception further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. We have marked the college transcripts in Exhibit 62 that are subject to section 552.102(b). Except for the information that reveals the degree obtained and the courses taken, the district must withhold the information in the transcripts under section 552.102(b).

Section 552.117(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who timely requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(1) must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(1) on behalf of a current or former employee who made a request under section 552.024 to keep the information confidential prior to the date on which the district received the request for information. The district may not withhold information under section 552.117(1) for a current or former employee who did not make a timely election under section 552.024 to keep the information confidential.

You state, and have provided documentation demonstrating, that Exhibit 62 contains the section 552.117(1) information of an employee who requested confidentiality for that information under section 552.024 prior to the date of the district's receipt of the request for information. We note that section 552.117(1) information relating to that same employee also is contained in Exhibit 59. The district must withhold the home address, home telephone number, personal cell phone number, and social security number of the employee in question, as well as any information that reveals whether the employee has family members, under section 552.117(1). We have marked a sample of the information in Exhibits 59 and 62 that the district must withhold under section 552.117(1). Exhibit 59 also appears to contain information relating to other employees of the district that may be excepted from disclosure under section 552.117(1). The district also must withhold the home address, home telephone number, personal cell phone number, social security number, and family member information of any other current or former employee of the district who timely requested confidentiality for that information under section 552.024. We have marked the types of information relating to other current or former employees that may be excepted from disclosure under section 552.117(1).

The documents in Exhibit 62 also contain account numbers. This information is confidential under section 552.136 of the Government Code, which provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. We have marked the account numbers that the district must withhold under section 552.136.

In summary, the district must not release the submitted information in Exhibit 59 that is governed by FERPA unless the district has authority under FERPA to do so. The personal e-mail addresses in Exhibit 59 that are not governed by FERPA must be withheld under section 552.137 of the Government Code. Some of the information in Exhibit 62 is confidential under section 21.355 of the Education Code and the Americans with Disabilities Act. The district must withhold that information under section 552.101 of the Government Code. The district must withhold the college transcripts in Exhibit 62, except for the information that reveals the degree obtained and the courses taken, under section 552.102(b). The district also must withhold the information in Exhibits 59 and 62 that is excepted from disclosure under section 552.117(1). Other information in Exhibit 59 may be excepted from disclosure under section 552.117(1). The district must withhold the account numbers in Exhibit 62 under section 552.136. The district must release the rest of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

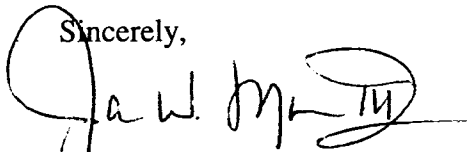
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III", with a stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 181477

Enc: Marked documents

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